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IN THE

Supreme Court of the United States

October Term, 1958.

No. 374

FRANCIS L. HARMON,

Petitioner,

vs.

RUTH ELIZABETH HARMON,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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RUTH ELIZABETH HARMON,

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Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled cause on May 2, 1958.

Opinion Below.

The opinion of the District Court of Appeal of the State of California, Second Appellate District, is printed in Appendix "B" hereof and is reported in 160 A. C. A. 49 and 324 P. 2d 901 and will soon be reported in ..... Cal. App. 2d .....

Presented Within Time.

The judgment of the District Court of Appeal was filed May 2, 1958. A timely petition for hearing in the Supreme Court of the State of California was denied by its

Order dated June 25, 1958. This petition and the certified record were filed with the Clerk of the United States Supreme Court within ninety days of the denial of a hearing by the California Supreme Court.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time runs from the date of the refusal to review. *American Railway Express Co. v. Levee*, 263 U. S. 19, 68 L. Ed. 140, 44 S. Ct. 11.

Statute Conferring Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257(3), since the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution of the United States and rights, privileges and immunities are claimed under the Constitution of the United States.

Questions Presented.

Question I.

May a wife who has deserted her husband and has surreptitiously absconded with his child to another state obtain "legal custody" of the child in an *ex parte* divorce proceeding in that other state compatibly with the principles of public law respecting the jurisdiction of courts that are implicit in Article IV, Section 1 of the Federal Constitution and are protected against federal violation by the Fifth Amendment and against state violation by Section 1 of the Fourteenth Amendment?

Question II.

May a state provide by legislation and its judicial interpretation in conformance with due process of law and equal protection of the laws guaranteed by Section 1 of

the Fourteenth Amendment that a father's minor child may be illegally and surreptitiously removed from his custody to other states and then order the father to support the child in other states without any hearing regarding the welfare of the child and in total disregard of the irreparable damage caused to the child by this action?

QUESTION III.

May a state deny a parent visitation rights with his minor child without substantial grounds therefor conformably with the provision of the Fourteenth Amendment "nor shall any State deprive any person of life, *liberty* or property without due process of law;"?

QUESTION IV.

May a state in conformance with the guaranty of due process of law and equal protection of the laws provided by Section 1 of the Fourteenth Amendment provide by legislation that its citizens shall be subject to the laws of any other state selected at random and with which they have no contact, present or past, of any type, as provided by Sections 1655 and 1670 of the Code of Civil Procedure of the State of California?

QUESTION V.

May a state in conformance with due process of law, equal protection of the laws and privileges and immunities guaranteed by Section 1 of the Fourteenth Amendment provide that a non-resident of a state may sue a resident of the state in its courts without the said non-resident being subject to a cross-complaint of any type, thus providing for the maintenance of a lawsuit without having a plaintiff before the court, as provided by Section 1690 of the Code of Civil Procedure of the State of California?

QUESTION VI.

May an action be maintained conformably with the principles of due process of law guaranteed by Section 1 of the Fourteenth Amendment without the real party in interest being a party to the action as Section 1675 of the Code of Civil Procedure of the State of California is interpreted by the California Courts.

QUESTION VII.

Is Section 1653(6) of the Code of Civil Procedure of the State of California and its judicial interpretation vague and indefinite so that men of common intelligence must guess as to its meaning and differ as to its application, thus being a denial of due process of law in contravention of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and Statute Involved.

The constitutional provision involved is Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute involved is the California Uniform Reciprocal Enforcement of Support Act consisting of Sections 1650 through 1690 of the Code of Civil Procedure of the

State of California, which was added to the Code by California Statutes of 1953, Chapter 1290, page 2843. The pertinent sections thereof are printed in Appendix "A".

Statement of Facts.

During World War II your petitioner worked for the United States Navy Department in Washington, D.C., temporarily residing in nearby Maryland, but at all times voting at his legal domicile in Grand Rapids, Michigan. Soon after the conclusion of hostilities, in September of 1946 he returned to his home in Grand Rapids, Michigan with his daughter Pauline, leaving money for his wife Ruth to join him, which she did the next day. Shortly thereafter she deserted him and absconded with his daughter without his knowledge or consent. [Rep. Tr. p. 37, line 14, to p. 40, line 14.] He reported to the Grand Rapids Police Department that his wife and child were missing, and about four days later she telephoned collect from Washington, D.C., stating that she had gone there. During the following years on several occasions he asked his wife to return to him and to return his daughter to him, but she refused and obtained an *ex parte* divorce in Washington, D.C. [Rep. Tr. p. 40, line 18, to p. 42, line 19.] A few years after the divorce, your petitioner remarried and is now in a position to provide his daughter with many advantages, but her mother refuses to let her write to him, talk to him on the telephone or visit him and instead has brought these proceedings against him. Your petitioner further testified that the child's present environment was unfit, but this was objected to and stricken. [Rep. Tr. p. 48, lines 20-26.]

In a summary proceeding the trial court ordered the defendant to pay his former wife for the support of his

daughter and the California District Court of Appeal affirmed the order. The Supreme Court of California denied a hearing. The trial court made no findings of fact or conclusions of law based thereon to support its order [Rep. Tr. p. 55, line 16, to p. 56, line 11, and the Minute Order in Appendix "B"] and its order was completely arbitrary and capricious. In affirming the order the California District Court of Appeal offers no relevant authorities and completely disregards opinions of United States District Courts, United States Courts of Appeal and of the United States Supreme Court, and further ignores the common law as expressed by the weight of authority throughout the United States and also ignores the opinion of the Attorney General and of the Supreme Court of Appeals of Virginia, the initiating state.

Federal Questions Were Raised.

In the Trial Court.

At the commencement of the hearing on this matter in the trial court the defendant moved the court to quash the service of process upon him upon several grounds, one of them being that the Support Act under which these proceedings were brought is unconstitutional in that it deprives the defendant of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. [Rep. Tr. p. 3, lines 14-17.] The motion was denied.

At the commencement of the continued hearing of this matter the defendant renewed and amplified his motion to quash the service of process upon him on several grounds, one of them being that the Support Act violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. [Rep. Tr. p. 29, lines 4-19.] The motion was denied.

The record in the trial court is sketchy because proceedings brought under the Act in question are regarded as summary and not entitled to a trial on the merits, and before defendant had concluded presenting his evidence, points and authorities, the Court commented "I think I have heard sufficient." [Rep. Tr p. 47, line 3.] When defendant attempted to present additional authorities the hearing was virtually terminated with the Court's comment "I am satisfied with the order." [Rep. Tr. p. 51, line 26.] Due to this situation your petitioner believes it not only proper, but essential, that the briefs filed with the District Court of Appeal be regarded as part of the record in this case. Points which appear very sketchy in the reporter's transcript were fully treated in the briefs and decided by the District Court of Appeal as being properly before it.

> Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state court disappears. *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 58 L. Ed. 1245, 34 S. Ct. 874.

In the District Court of Appeal.

The Support Act was challenged in the briefs as being repugnant to the due process of law, equal protection of the laws, and privileges and immunities provisions of Section 1 of the Fourteenth Amendment, and it was further claimed that by reason thereof the defendant was deprived of his property without due process of law, was denied equal protection of the laws and was denied privileges and immunities, all of which are guaranteed to him by the Fourteenth Amendment. The opinion of the Dis-

trict Court of Appeal specifically upheld the constitutionality of the Act and specifically held that the defendant was not denied the guaranties of the Fourteenth Amendment.

In the Supreme Court of California.

In a Petition for Hearing in the Supreme Court of California the same objections to the constitutionality of the Act and the denial of federal rights were asserted as had been raised in the District Court of Appeal. A hearing was denied.

Judgment of Highest Court of State?

When the Supreme Court of California denied a hearing, the District Court of Appeal became "the highest state court in which decision could be had."

> Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396.

A "Final Judgment"?

When the Supreme Court of California denied a hearing, nothing remained to be done except for the District Court of Appeal to issue its remittitur transmitting its affirmance of the trial court's Order and for the trial court to enforce it.

> A judgment is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution, what has been determined. *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579; *Dept. of Banking v. Pink*, 317 U. S. 264, 87 L. Ed. 254, 63 S. Ct. 233.

Reasons for Granting the Writ.

The Questions Are Substantial.

FIRST QUESTION, RESERVED IN *Halvey* CASE.

Your petitioner takes the position that the first question *has been answered* by this Court in *May v. Anderson*, 345 U. S. 528, 532-33, 97 L. Ed. 1221, 73 S. Ct. 840, where the Court said:

> "The narrow issue thus presented was noted but not decided in *Halvey v. Halvey*, 330 U. S. 610, 615-616. There a mother instituted a suit for divorce in Florida. She obtained service on her absent husband by publication and he entered no appearance. The Florida court granted her a divorce and also awarded her the custody of their child. There was, therefore, inherent in that decree the question 'whether in absence of personal service the Florida decree of custody had any binding effect on the husband; . . . .' *Id.*, at 615. We were not compelled to answer it there and *a decision on it was expressly reserved.*" (Emphasis added.)

In the *May v. Anderson* case the situation was reversed from that existing in the *Halvey* case in that the custody of the children purportedly had been awarded to the father in an *ex parte* divorce and the mother was protesting the validity of the award. Thus it appears that the court intended to answer the question reserved in the *Halvey* case when it decided, in terms fitting the factual situation existing in *May v. Anderson*, at pages 534-535:

> "We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in

order to deprive their mother of her personal right to their immediate possession.

"The judgment of the Supreme Court of Ohio, accordingly, is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion."

Especially since the Court specifically referred to the question reserved in the *Halvey* case relating to a father's custody rights, it seems necessarily to follow that its opinion in *May v. Anderson* applies to a *parent's* custody rights, either father's or mother's. No other interpretation seems possible unless it should be held that American husbands and fathers are second-class citizens not entitled to equal rights with wives and mothers.

The Support Act requires that the person bringing an action in behalf of a minor must have "legal custody" of the minor and therefore in order to affirm the judgment herein the District Court of Appeal overruled the United States Supreme Court's opinion regarding the custody of minors with the sole explanation that "Pauline was residing with her mother when the decree was granted and has resided with her since that time. This contention is not sustainable."

It thus seems essential that the answer to this question be clarified for the benefit of all American children and fathers.

SECOND QUESTION:

Just the reading of the second question is sufficient to cause a person to cringe at the thought. Then, of course, he would shrug it off with the thought that it couldn't happen in the United States. Unfortunately, it not only could happen, but the fact is that the two most populous

states in the United States, New York and California, have seen fit to undertake such an assault on American homes and children on a mass production basis.

The unconstitutionality and illegality of ordering fathers in a summary proceeding to pay for the support of their children in some other state when these fathers are then and there legally entitled to, and are demanding, the custody of their children, is so apparent as to make the citation of authorities seem superfluous. However, the following are presented as a matter of routine.

> Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial. *Truax v. Corrigan*, 257 U. S. 312, 332, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375.

And quoting briefly from an opinion of the Attorney General of the Commonwealth of Virginia dated March 28, 1956; Annual Report of the Attorney General 1955-56, page 205:

> "'Where the child is living away from the father, the question of his liability will depend upon the circumstances of the case.' *Mihalcoe v. Holub*, 130 Va. 425, 430. * * *
>
> "'To say the least of it, he has the right at common law to maintain them in his own home, *and he cannot be compelled against his will to do so elsewhere, unless he has refused or failed to provide for them where he lives.*' *Butler v. Commonwealth*, 132 Va. 609, 614. * * *
>
> "These propositions are abundantly supported by authority."

> The rights of parents over child are in nature of "property rights" within protection of due process clause, so that parents are entitled to a hearing and judicial determination as to whether they have been guilty of abandonment or neglect of infant or other anti-social conduct proscribed by Vernon's Ann. Civ. St., arts. 46a, 2329-2338, thereby depriving them of further right in and to child. *Brooks v. De Witt*, 178 S. W. 2d 718, reversed on other grounds, 182 S. W. 2d 687, 143 Tex. 122, cert. den. 65 S. Ct. 1196, 325 U. S. 862, 89 L. Ed. 1983.

However, in order to evade this point the opinion of the District Court of Appeal states that "There has been no determination that the defendant is entitled to the custody of the child" This appears to be the beginning of a new doctrine of law, that parents need to have it determined that they are entitled to the custody of their children. It appears that if they have neglected to follow this previously unheard of procedure, anyone may take their children without question. As set forth more fully in *Meyer v. Nevada* quoted under the following Question Three, it is the opinion of the United States Supreme Court that such rights are protected by the Federal Constitution.

THIRD QUESTION.

It seems self-evident that a State can not constitutionally and legally deny a parent visitation rights with his children without a showing of the gravest reasons therefor.

> "In absence of express prohibition, rights of reasonable visitation, including right to have children on proper occasions, ensues from parenthood." *Exley v. Exley*, 101 Cal. App. 2d 831, 226 P. 2d 662.

In *Meyer v. Nevada*, 262 U. S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625, this Court said regarding the "liberty" guaranteed by the Fourteenth Amendment:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual * * * to marry, establish a home and *bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."

A parent's right not to have his children arbitrarily taken from him by the state was perhaps not entirely absent from the mind of the Court when in *West Virginia v. Barnett*, 319 U. S. 624, 638, 87 L. Ed. 1628, 63 S. Ct. 1178, the Court said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vissitudes and political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, *liberty* and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote. They depend on the outcome of no elections."

Fourth Question.

The obviously unconstitutional "choice of law" provision of Section 1670 of the Support Act has been disavowed by the Commissioners on Uniform Laws as having been "hurriedly drafted" and has been removed from

the Uniform Act. Nevertheless, it remains as a threat to the peace and security of American Citizens residing in California, Colorado, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, Puerto Rico, Rhode Island, Texas, Virginia, Washington and West Virginia. Most victims of this Act are totally unable even to attempt to defend themselves in the court of first instance, much less on appeal for protection which may or may not be forthcoming, and these countless thousands of American citizens are deserving of the protection of the United States Supreme Court.

An American citizen residing in Ohio enjoys protection of the Constitution and the law, as the Supreme Court of Ohio said in *Pennsylvania v. Mong*, 160 Ohio St. 455, 117 N. E. 2d 32, "Subjecting him to the making of support payments compulsory under the law of another state, * * *, is violative of his right to equal protection." However, an American citizen residing in California must be content to learn that "The purpose of the section is to give the dependent an election in the event of conflicting laws. In any event, defendant cannot raise this question since the choice is that of the obligee-plaintiff." *Smith v. Smith*, 125 Cal. App. 2d 154, 270 P. 2d 633.

In *West Virginia State Bd. of Edu. v. Barnette*, 319 U. S. 624, 641, 87 L. Ed. 1628, 63 S. Ct. 1178, this Court said:

> "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

But if citizens are to be governed by the laws of other states, where is the consent? Such a provision could make certain states Nevadas of support, and is a threat to the welfare of everyone in the United States.

FIFTH QUESTION.

The provision of Section 1690 of the Support Act permitting a non-resident to file and maintain a lawsuit without being either actually or constructively before the court is obviously in contravention of the law of the land. It does not appear that states have heretofore legislated against their own residents and in favor of non-residents, and hence most existing authorities merely rule out the practice of discriminating against non-residents. However, there is ample authority which would prohibit discrimination either way on the basis of constitutionally required equality of treatment in this regard.

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, *and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.*" *Chambers v. Baltimore, etc., R. Co.*, 207 U. S. 142, 52 L. Ed. 143, 28 S. Ct. 34.

The federal courts enforce the rule that the court cannot adjudicate directly on rights of a person not actually or constructively before it. *Hyams v. Old Dominion Co.*, 204 Fed. 681, modified 209 Fed. 808, 126 C. C. A. 532, cert. den. 232 U. S. 726, 58 L. Ed. 816, 34 S. Ct. 603.

A court cannot adjudicate directly upon a person's rights without such person being either actually or constructively before the court. *Mallow v. Hinde*, 25 U. S. 193, 12 Wheat. 193, 6 L. Ed. 599.

SIXTH QUESTION.

This question is closely related to the Fifth Question, and yet is clearly distinguishable from it. The difference is that the preceding question was based upon Section 1690 of the Support Act which is unconstitutional on its face and in every state, whereas the Sixth Question relates to Section 1675 which is not unconstitutional *per se*, but is rendered so in California by interpretation.

Thus in conformance with the constitution and the law the Supreme Court of North Carolina stated in a case brought under the Support Act, *Mahan v. Read*, 240 N. C. 641, 83 S. E. 2d 706:

> "The obligees are the children. Respondent owes no duty of support to petitioner. * * * Thus, the obligees, who should be the petitioners, are the real parties in interest; * * * Where there is a fatal defect of parties plaintiff, of which the Court will take notice *ex mero motu*, the action must be dismissed."

This is nothing more or less that a reaffirmance of legal principles established in antiquity and confirmed through the ages.

> In deciding who are parties to suit, the court will not look beyond the record. *Davis v. Gray*, 83 U. S. 203, 16 Wall. 203, 21 L. Ed. 447.

> In a suit in equity, the court will not render a decree affecting the rights of parties who are not before it. *Litchfield v. The Register*, Fed. Cas. No. 8388, 1 Woolw. 299, aff'd 76 U. S. 575, 9 Wall. 575, 19 L. Ed. 681.

SEVENTH QUESTION.

This question challenges the constitutionality of Section 1653(6) due to its vagueness of meaning. As this Court has said, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Connally v. Gen. Const. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126.) While the section in question does not appear to be vague *per se*, it must be remembered that the Supreme Court of the United States must follow the construction of a state statute given by the state court, and test the constitutionality of the statute under that view (*Gatewood v. North Carolina*, 203 U. S. 531, 51 L. Ed. 305, 27 S. Ct. 167), and the state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation. (*Wheeling Steel Corp. v. Glander*, 337 U. S. 562, 93 L. Ed. 1544, 69 S. Ct. 1291.) Adminstration and interpretation of a statute may render it unconstitutional (*Rhea v. Edwards*, 136 Fed. Supp. 671), and in considering the constitutionality of statutes, the District Court must look beyond the face of the statutes themselves to the practical applications thereof. (*Mills v. Lowndes*, 26 Fed. Supp. 792.) The Supreme Court, in passing on constitutional questions, regards substance, and statute attacked must be tested by operation and effect. (*Near v. State of Minnesota ex rel. Olson*, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625) and laws which are drawn so widely as to destroy innocent in order to catch guilty cannot be within due process. (*Melton v. Railroad Commission of Texas*, 10 Fed. Supp. 984.)

The thing to be noted in the instant proceedings is that nowhere in the record, findings of fact, conclusions of

law or the Opinion of the District Court of Appeal is any reason offered why a father should support a child outside of his home when he is then and there ready, willing and able to do so in his home and is legally entitled to its custody. This is vagueness of the highest order and is a vagueness that is causing the dissolution of American homes on a wholesale basis with its attendant rise in juvenile delinquency, considered by many to be the nation's number one domestic problem.

Conflicts With Other Opinions.

A summary of the points and authorities set forth in the discussion of the questions above indicates that the Opinion herein conflicts with the following courts and cases:

I. The United States Supreme Court in *May v. Anderson*, 345 U. S. 528.

II. a. The Supreme Court of Virginia in *Mihalcoe v. Holub*, 130 Va. 425, and *Butler v. Commonwealth*, 132 Va. 609.

b. The Opinion of the Attorney General of the State of Virginia and numerous cases cited therein.

c. The Supreme Court of Texas in *Brooks v. De Witt*, 143 Tex. 122.

III. The District Court of Appeal of California in *Exley v. Exley*, 101 Cal. App. 2d 831.

IV. The Supreme Court of Ohio in *Pennsylvania v. Mong*, 160 Ohio St. 455.

V. a. The United States Supreme Court in *Chambers v. Baltimore, etc. R. Co.*, 207 U. S. 142 and *Mallow v. Hinde*, 25 U. S. 193.

b. A United States Circuit Court of Appeals in *Hyams v. Old Dominion Co.*, 204 Fed. 681, mod. 209 Fed. 808, cert. den. 232 U. S. 726.

VI. a. The Supreme Court of North Carolina in *Mahan v. Read*, 240 N. C. 641.

b. The United States Supreme Court in *Davis v. Gray*, 83 U. S. 203, and *Litchfield v. The Register*, 76 U. S. 575.

It thus appears that the Opinion herein on several substantial federal questions is in conflict with applicable decisions of this Court; other federal questions not heretofore determined by this Court have been decided in a way not in accord with principles set forth by this Court and in conflict with the Supreme Courts of several other states; and the opinion on other federal questions of procedure and jurisdiction so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Large Number of Persons Adversely Affected.

In Los Angeles County alone the number of cases filed under this Act has passed 15,000 and is increasing by some 2500 each year. Nationwide figures are not available, but it seems to be reasonably certain that they exceed 100,000 and are increasing at an alarming rate toward being counted in the millions. What does it mean? Where are we headed? The "empire builders" promoting the Act at taxpayers' expense loudly proclaim their marvelous "success", but the thoughtful person may wonder what actually is being accomplished. How many homes are being destroyed by "The Law That Broke the Family's Back" which would not have been but for its existence? For several decades we have witnessed the spec-

tacle of divorces without cause, and the United States has the inevitable result, the highest rate of crime and juvenile delinquency of any country in the world. As a result of the systematic abuse of the Support Act we are now moving into a new era, one of *de facto* divorces *without hearings*. In Los Angeles we now have a weekly television program ("Divorce Court", Wednesdays, 9:00-10:00 p.m., Channel 11, KTTV) advertising the availability of divorce without grounds. Of course there are some drawbacks even to this; waiting several months for trial, a year's wait before the decree is final, the hazard that the custody of children will not be awarded to an unfit mother, and the very real likelihood of a prohibition of removing the children from the state. But now we have the perfect answer to any embarrassing or annoying problems. The District Attorney has his five-minute spot at the beginning or end of the program advertising, not *in haec verba*, but with unmistakable clarity. "Desert your husband *tomorrow*. Kidnap his children. He has a job and can't follow you and I'll collect his pay to finance your desertion so that you can get an uncontested divorce at some remote divorce mill and there's nothing he can do about it."

At this point attention might well be drawn to the "Minute Order" which is the *Final Judgment* in this action. It is set forth in Appendix "B" and it should be noted that there is no finding of fact which would support a judgment of any type in conformance with the fundamental rule of law that $F \times R = D$. However, it is necessary to refer to a photostatic copy of the original minute order at page 23 of the Clerk's Transcript in the certified record to see the full implication of this order. From a photostatic copy it is readily apparent that it is a *printed form* with blanks for typing in names and other

relevant data. In other words, the so-called "findings of fact" are identical in every case, turned out on a mass production basis, in disregard of facts in the case. Without facts, there is no law to apply, and obviously the "Judgments" are completely arbitrary and capricious.

> "Every question of law arises out of a fact situation, and if there be no state of facts there can be no question of law." *United States v. Rodenbough*, 14 F. 2d 989.

> "The court is without jurisdiction to award a judgment upon any other basis than principles of law; it cannot base a judgment upon an approximation which would of itself be simply a finding without a basis of fact." *Damish v. United States*, 79 Ct. Cl. 530, cert. den. 295 U. S. 755, 79 L. Ed. 1698, 55 S. Ct. 913.

There is a serious question as to just how many more of these illegal judgments the United States can endure and survive as a nation in our troubled world.

> "A democratic society rests, for its continunace, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Commonwealth of Massachusetts*, 321 U. S. 158, 168, 88 L. Ed. 645, 64 S. Ct. 438.

Although the State has control of domestic relations and

> "While the federal government does not have right to regulate certain matters exclusively within the control of the States, it does have the right, by virtue of the XIV Amendment, to prevent any such regulation from being arbitrary and discriminatory." *Eastman v. Yellow Cab Co.*, 173 F. 2d 874.

It thus seems that the Federal Government has the right (which it must exercise for its own survival) to take action to halt the wholesale destruction of American homes being conducted by some states, and to restore American husbands and fathers to the status of first class citizens. In considering the effect of this evil Act and the vast numbers adversely affected by it, sight should not be lost of the fact that by its horrible example, countless, if not *all*, homes in the United States are undermined to the point where they might as well be broken. In this regard a few words from an article (Reader's Digest, March 1958) by Judge Samuel S. Leibowitz, Senior Judge of Brooklyn's highest criminal court are of interest:

> "Every criminal court's judge in this country is sickeningly aware of the terrible fact that teenagers are replacing adults on the criminal dockets. Our awareness is often twinged with despair, almost panic. We flail at the problem with a jumble of uncoordinated 'solutions': teenage curfews, more playgrounds, punishing parents for teenagers' crimes, more social workers. To me, sitting on the bench in the capacity of society's conscience, such 'solutions' are treatments of the effect rather than the cause.
>
> "It has seemed to me that something down deep, simple but basic, must have disappeared from our way of life to have caused this revolt toward crime among our young people. But what was it? For several years I searched through the debris of the young, ruined lives brought before me, trying to find a lead, but without results. * * *
>
> "* * * I went into Italian homes to see for myself. I found that even in the poorest family the father is respected by the wife and children as its

head. He rules with varying degrees of love and tenderness and firmness. His household has rules to live by, and the child who disobeys them is punished. Thus I found the nine-word principle that I think can do more for us then all the committees, ordinances and multimillion-dollar programs combined: *Put Father back at the head of the family.*"

Here is presented an opportunity for this Court to take an important step in that direction, an opportunity that likely will not be repeated in the near future. As Mr. Justice Rutledge said in *Williams v. North Carolina*, 325 U. S. 226, 252, 89 L. Ed. 1577, 65 S. Ct. 1092, 157 A. L. R. 1366:

> "It cannot be assumed that the matter will affect only a few. For this has become a nation of transient people. Lawyers everywhere argue for or against divorce and courts grant or deny it, depending not on the probability that the case will come here, but on what is done here with the few cases which do come. *The matter is altogether too serious, for too many, for glossing over the crucial basis of decision.*" (Emphasis added.)

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS L. HARMON,

Petitioner pro se.

APPENDIX "A."

Pertinent Sections of the Code of Civil Procedure of the State of California.

Sections 1650 *et seq.* being known as the.

Uniform Reciprocal Enforcement of Support Act

1653. As used in this title unless the context requires otherwise,

* * *

(6) "Duty of Support" includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise.

1655. Duties of support arising under the law of this State, when applicable under Section 1670, bind the obligor, present in this State, regardless of the presence or residence of the obligee.

1670. Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee.

1675. A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor wtihout appointment as guardian *ad litem*.

1690. Participation in any proceedings under this title shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding.

APPENDIX "B."

The "Minute Order" Constituting the Final Judgment".

In Department 8 of the Superior Court of the State of California, in and for the County of Los Angeles.

Date: May 17, 1956.

Honorable Elmer D. Doyle, Judge; T. Kurtz, Deputy Clerk; R. J. Burrell, Deputy Sheriff; H. R. Person, Reporter.

Resl 7124.

Ruth Elizabeth Harmon v. Francis L. Harmon.

Counsel for Plaintiff: S. Ernest Roll, District Attorney, and Harold Pressman.

Counsel for Defendant: John Weyl.

NATURE OF PROCEEDINGS:

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

Defendant's Motion to Quash is argued and denied; and

Defendant's Exhibit "A" (Group of Checks) is admitted in evidence and filed; and

Defendant is sworn and testifies.

The petition of Ruth Elizabeth Harmon having been heard, the court makes the following findings of fact and order:

That the minor child listed in said petition is the minor child of the petitioner and the respondent; that said minor child is residing with the petitioner in the County of Fairfax, State of Virginia, and is partially dependent upon the

respondent for support; that the respondent owes a duty of support of said minor child; that the respondent resides in the County of Los Angeles, State of California; that the sum of $30 a month is a reasonable amount to be contributed by the respondent toward the support and maintenance of said minor child; that the respondent has the present ability to pay said amount.

It is therefore ordered that the respondent owes a duty of support of the minor child herein; and that he pay through the office of the Probation Officer in and for the County of Los Angeles, State of California, for the support and maintenance of said minor child $15 on the 10th and $15 on the 25th days of each month commencing May 25, 1956, to continue until further order of court. The Probation Officer is ordered to hold any and all monies received from this respondent in connection with these proceedings pending decision on appeal. The court further orders that the clerk of the Superior Court, in and for the County of Los Angeles, State of California, transmit a copy of this order, forthwith, to clerk of the Juvenile and Domestic Relations Court, Fairfax County, Virginia; together with a copy of the transcript of these proceedings.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Ruth Elizabeth Harmon, Petitioner and Respondent, v. Francis L. Harmon, Defendant and Appellant. Civil No. 22130.

Filed: May 2, 1958.

Appeal from an order of the Superior Court of Los Angeles County. Elmer D. Doyle, Judge. Affirmed.

Weyl, Dunaway & Weyl and John A. Weyl for Appellant.

Edmund G. Brown, Attorney General, Clarence A. Linn, Assistant Attorney General, and Victor Griffith, Deputy Attorney General, for Respondent.

On February 17, 1956, Ruth Elizabeth Harmon, petitioner herein, commenced a proceeding in the Juvenile and Domestic Relations Court, in Fairfax County, Virginia, under the provisions of the Reciprocal Enforcement of Support of Dependents Act of Virginia. She alleged in her verified petition that she is the wife of Francis L. Harmon; they were married on June 10, 1942, in Washington, District of Columbia; she resides in Alexandria, Virginia; she and Francis are the parents of Pauline E. Harmon, who was born December 8, 1944; petitioner and Pauline are entitled to support from Francis; he never has supported them according to his means and earning capacity; Francis resides (at a specified address) in Los Angeles County, California.

The judge of said court in Virginia made a certificate which stated, among other things, that in the opinion of

the judge the petition sets forth facts from which it may be determined that Francis owes a duty of support and that such petition should be dealt with according to law. Exemplified copies of the following documents were transmitted to the superior court in Los Angeles County, California: the petition; the certificate of the judge; the Code of Virginia relating to the Reciprocal Enforcement of Support of Dependents Act; the testimony of Ruth; and an affidavit of Ruth as to her inability to pay filing fee and other costs.

The superior court, in Los Angeles County, issued an order directing Francis to show cause why an order should not be made on the basis of said petition. Hearings were had, in said superior court upon the order to show cause, on March 29 and May 17, 1956. The court found that Pauline is the minor child of Ruth and Francis; the minor is residing with Ruth in Fairfax County, Virginia, and the minor is partially dependent upon Francis for support; Francis owes a duty of support of the minor; Francis resides in Los Angeles County; a reasonable amount to be contributed by Francis toward the support of the minor is $30 a month, and he has the ability to pay that amount. The court ordered that Francis pay, through the office of the probation officer of Los Angeles County, for the support of the minor $15 on the 10th and 25th days of each month commencing May 25, 1956, and that the probation officer hold all the money so paid, pending the decision on appeal.

Defendant Francis L. Harmon appeals from said order of May 17, 1956.

At the hearings in Los Angeles County, Francis was represented by his counsel, Mr. John A. Weyl; and Ruth was represented by the District Attorney.

At the hearing on March 29, the defendant Francis testified, under section 2055 of the Code of Civil Procedure, as follows: he is employed by the Department of Water and Power of the City of Los Angeles, and his take-home pay is $292 a month (later it was said the amount was $394 a month); his daughter, Pauline, is 11 years of age; Ruth deserted him on December (September) 25, 1946, and he has been separated from her since that time; at that time he was living in Michigan, and Ruth took Pauline away from him without his knowledge and consent; Ruth obtained a divorce in the District of Columbia; he did not contest the divorce action; he has remarried; he has sent a few checks, now and then, for the support of Pauline; he sent checks in February and January, 1956, and December, 1955, in the amounts of $20, $10, and $25, respectively. At that hearing, the attorney for Francis requested a continuance in order that he might have an opportunity to submit written interrogatories which he desired to ask Ruth, who was in Virginia. Upon stipulation, it was ordered that the interrogatories be copied in the reporter's transcript. The transcript, which included the interrogatories, was sent to the Virginia court.

At the beginning of the said hearing, defendant made a motion to quash the service of process, as to him, upon the ground that no duty of support was imposed upon him under section 1670 of the Code of Civil Procedure, and that the provisions of said section were unconstitutional in that they deprive him of property without due process of law, and that the services of the prosecuting attorney and the use of public money, in such a matter, are in contravention of the laws of California. He also objected to the proceedings on the grounds (1) that the initiating

papers did not show that the Virginia court had determined the amount that should be paid for support, and (2) that the petitioner (Ruth) was not a bona fide resident of Virginia but was a resident of the District of Columbia. The motion was denied.

At the hearing on May 17, 1956, the interrogatories and Ruth's answers thereto were in the file of the case and were before the court. The attorney for defendant stated that the amount of defendant's take-home pay was $394 a month instead of $292 as shown by the transcript. Defendant's attorney renewed his motion to quash service of process, and he stated that the Reciprocal Enforcement of Support Act was unconstitutional in several respects. (The specifications regarding unconstitutionality were the same as those presented on this appeal, as hereinafter referred to.) The motion to quash was denied.

Some of the testimony of Ruth, as shown by the interrogatories and her answers, was as follows: she has resided in Alexandria, Virginia, one year and seven months; the divorce decree, which was obtained in Washington, D. C., did not provide for alimony or child support; she is employed by the Internal Revenue Service (in Washington, D. C.) as a clerk-typist; her take-home pay is $2,800; in September, 1946, Francis took Pauline from the home of Ruth and Francis, in Maryland, to the home of Francis' mother in Grand Rapids, Michigan; she (Ruth) received a telegram from Francis (stating that he and Pauline had gone to his home in Michigan, and asking Ruth to bring Pauline's things); after Ruth had been in Grand Rapids two days she took Pauline and left Grand Rapids; Francis was in Michigan at his mother's home when Ruth last saw him; she intends to reside permanently in Virginia; she did not move to

Virginia for the purpose of filing the present proceeding, her present status is that of divorcee.

At the hearing on May 17, defendant testified that he and Ruth were married on June 10, 1942, in the District of Columbia; a few months thereafter they moved to Maryland where they lived about four years; on September 22, 1946, he left Maryland and went to Grand Rapids; he took Pauline with him; he sent a telegram to Ruth, advising her to come to Grand Rapids; Ruth came there the next day; one afternoon while he was away from his mother's home in Grand Rapids, Ruth left Grand Rapids and took Pauline with her; four days later Ruth told him by telephone that she was in Washington, D. C.; he has not seen Ruth since she left Grand Rapids; in October, 1946, he went to Guam to work on a project for the Navy, and then he wrote to Ruth stating that when the Navy assigned a house to him she should come to Guam; she ignored the letter; after he had been in Guam 18 months, he went to Hawaii and obtained a position in a shipyard; he asked Ruth to come there, but she did not come; he has been in Los Angeles since October, 1951; while in Guam he received a document from the court in Washington; he could not go to Washington to contest the divorce action; when he arrived in Los Angeles, she had obtained a divorce; from November, 1944, to April, 1946, he sent several checks in various amounts, ranging from $20 to $40, to Ruth; he has not supported Ruth since 1946; he has been able and willing, at all times, to support Pauline provided she is at his domicile; he has sent gifts and money to Pauline at Christmas; the approximate amount of his monthly expenses is $425.

The Reciprocal Enforcement of Support Act will be referred to herein as the Act.

Appellant asserts that the provisions of the Act (sections 1650 to 1690, inclusive, of the Code of Civil Procedure) are unconstitutional in that section 1653, wherein the "Duty of support" is defined, is so vague and indefinite that men of common intelligence must guess as to its meaning. Section 1653, subdivision (6), provides: "*'Duty of support'* includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise." Section 1670 of said code provides: "Duties of support enforceable under this title are those imposed, or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee." Appellant argues that since the evidence shows that there has never been a prior court order regarding support, no duty is imposed upon him by law or court order, and therefore any order made in this proceeding as to him must rest on a duty imposable by law. He argues further that since Ruth has deprived him of the custody of the child, the duty to support the child rests with Ruth, and therefore no duty is imposable by law upon him in California to support the child. He argues further that since no duty of such support is imposable in California, and since it must be presumed (in the absence of evidence as to the law of Virginia) that the law of Virginia is the same as the law of California, no such duty is imposable upon him in Virginia. Appellant's further statement that the Cali-

fornia court could not take judicial notice of the laws of Virginia is not an accurate statement. Section 1875 of the Code of Civil Procedure of California provides, in part: "Courts take judicial notice of the following facts: . . . 3. . . . the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." Subdivision 6 of section 20-88.12 of the Code of Virginia is the same as subdivision 6 of section 1653 of the Code of Civil Procedure of California, except that in the Virginia code the word "legal" precedes the word "separation" which is near the end of the sentence (thereby reading "judicial legal separation"). The provisions of subdivision 6 of said section 1653 are not so vague or indefinite that by reason thereof they are unconstitutional as applied to the facts in the present matter. Ruth obtained a divorce from defendant in Washington, D. C. several years ago, and at that time defendant was in Guam and he knew of the pendency of the action, but he did not contest it. Pauline has resided with Ruth since 1946 and was residing with her at the time of the divorce. A duty was imposable upon defendant to support his minor child.

Appellant asserts that the Act is unconstitutional in that it denies him the equal protection of the laws of California. He argues that since he has never been a resident of Virginia, any attempt, under the provisions of section 1670 of the Code of Civil Procedure of California, to subject him to the laws of Virginia is a denial of the protection of the laws of California; and that the theory that he is being subjected to the laws of California only and that the Virginia court is merely assisting in procedure (as argued in other cases) is unrealistic. He

argues further that the Act (section 1655 of the Code of Civil Procedure) denies him the equal protection of the laws by purporting to allow the entry of an order for the support of a nonresident child whose custody is not subject to the jurisdiction of the court; that said section deprives him of the right of asking for the custody of the child and for other relief which would be available if the child were before the California court, and denies him relief which is available to other fathers who are residents of California. In Smith v. Smith, 125 Cal. App. 2d 154 [270 P. 2d 613], it was said at page 169: "The equal protection clause does not preclude the states from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike . . . The support law operates as to persons in this state on the same basis. The classification of certain persons as being entitled to support is no different from support statutes which operate between residents of the same state. The purpose of the classification is a reasonable one and it has a fair and substantial relation to the object of the law. The support law provides a reasonable classification when tested in the light of the traditional judicial application of the equal protection clause." This contention is not sustainable.

Appellant also contends that the Act is unconstitutional in that it denies him the privileges and immunities guaranteed by the United States and California Constitutions. He argues that the Act (referring to section 1690 of the Code of Civil Procedure) allows a nonresident petitioner to bring an action in California without being sub-

jected to the jurisdiction of California courts in the matter of a counterclaim, cross-complaint, or other affirmative relief. In Landes v. Landes (1956), 153 N. Y. S. 2d (Court of Appeals) 14, it was said at page 19: "Reciprocal enforcement of a support order aimed at this primary parental obligation may not be avoided or excused by resort to the immunities and privileges clause of the Federal Constitution . . . ." This contention is not sustainable.

Appellant asserts that this proceeding cannot be maintained in behalf of the minor unless the minor is a party to the proceeding. Section 1675 of the Code of Civil Procedure of California provides: "A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian *ad litem*." Cases wherein a mother was petitioner in proceedings for orders for support of minor children are: Smith v. Smith, 125 Cal. App. 2d 154 [270 P. 2d 613]; Whittlesey v. Bellah, 130 Cal. App. 2d 182 [278 P. 2d 511]; and Smith v. Smith, 131 Cal. App. 2d 764 [281 P. 2d 274]. This contention is not sustainable.

Appellant asserts further that such a proceeding as the present one cannot be brought by a person who does not have legal custody of the minor, and cannot be brought when there has been no adversary proceeding concerning the custody of the child. Section 1675 of the Code of Civil Procedure does provide, as above shown, that a complaint on behalf of the minor may be brought by a person having legal custody of the minor. Appellant argues to the effect that since the divorce decree was granted in an *ex parte* proceeding, when he was not within the jurisdiction of the court that granted the de

cree, it would appear that Ruth, the mother, who obtained the divorce decree and who filed the petition herein for support of the child, did not have legal custody of the minor. Pauline was residing with her mother when the decree was granted and has resided with her since that time. This contention is not sustainable.

Appellant asserts that such a proceeding as this one cannot be maintained under circumstances where the wife departs from the marital domicile and moves to another jurisdiction. He argues that the purpose of the Act is to obtain support for wives and children who have been abandoned, and where a father absconds to another state. He argues further than since Ruth left him and took the child with her, and since he chose a reasonable place or mode of living and Ruth has failed to conform thereto, he cannot be considered in the class of an absconding father. It was Ruth who obtained the divorce. The record does not show upon what ground the divorce decree was granted. The testimony of Ruth, as shown on the document herein, dated November 10, 1955, and entitled "Testimony of Petitioner," states that "Non-support" led to the separation from Francis. Defendant relied on the divorce decree when he remarried. It does not appear herein that the question has been determined as to whether he deserted her or she deserted him. The material question herein is whether defendant owes a duty to support his daughter. There is no requirement that as a condition to bringing a proceeding under the Act there be a showing that the obligor has absconded. In Smith v. Smith, *supra*, 131 Cal. App. 2d 764 [281 P. 2d 274], it was said at page 770: "The acts in question [Uniform Reciprocal Enforcement Acts] are not limited to cases where an obligor flees the juris-

diction of an initiating state." In the present case the evidence was sufficient to support the finding that defendant owes a duty to support his daughter.

Appellant asserts that a father who is entitled to the custody of a minor child, and who is willing and able to support the child at his domicile, cannot be required to furnish support for the child outside the father's home. There has been no determination that the defendant is entitled to the custody of the child. Defendant's assertion that he is willing and able to support his daughter at his domicile is not a sufficient answer to the petition herein.

Appellant asserts that the trial judge abused his discretion in not allowing him visitation privileges with the child, during summer vacation. Appellant states in his brief that, after the hearing on May 17, he made a motion to reopen the matter for a further hearing and to modify the order of May 17 so that he might have reasonable visitation privileges with his child and might have the child with him during summer vacation. His brief also states that the motion was denied without prejudice. It does not appear that the judge abused his discretion.

Appellant asserts that the initiating papers were not sufficient to constitute a cause of action or to support the proceedings or order herein. His argument is that the petition was not in the name of the child; that the petition alleged that Ruth is the wife of Francis, whereas it was shown by her answer to an interrogatory that she obtained a divorce in 1950; and that the certificate transmitted from the Virginia court does not show, in the blank space provided therefor, the amount needed for support. The point with reference to the child not being named as a

party to the proceeding has been discussed hereinabove. It was not necessary that the Virginia judge state in the certificate the amount required for support. At the hearings in California, evidence was presented as to Ruth's income, the expenses and needs of Pauline, and the income and expenses of defendant. The petition, and the certificate of the Virginia court, were sufficient.

Defendant was not denied due process of law, or the equal protection of the laws, or the privileges and immunities guaranteed by the United States and California Constitutions.

The order is affirmed.

WOOD, *J.*

We concur:

SHINN, *P. J.*

VALLÉE, *J.*